LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
JUN 12 1970
JOHN F. DAVIS, CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, [redacted] 1970

No. [redacted] 251

STATE OF CALIFORNIA and WALTER E. CRAVEN, Warden of Folsom State Penitentiary,

Petitioners,

vs.

PAUL K. IMBLER,

Respondent.

PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

THOMAS C. LYNCH,
Attorney General of California,
ALBERT W. HARRIS, JR.,
Assistant Attorney General,
6000 State Building,
San Francisco, California 94102,
Telephone: (415) 557-0457,
Attorneys for Petitioners.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

Subject Index

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statute Involved	4
Statement of the Case	4
A. Proceedings in the state courts	4
B. Proceedings in the federal courts	5
Statement of Facts	7
A. The murder trial	8
B. The state habeas corpus proceeding	9
C. The decision of the District Court	14
D. The Opinions of the Court of Appeals	15
Reasons for Granting Writ of Certiorari	18
This case presents a number of important questions of federal law which have not been, but should be, settled by this court. The questions revolve around the basic question of whether a federal habeas court is bound by state court factual determinations reached after a full and fair hearing unless a vital defect is found as set forth in Title 28, United States Code section 2254(d)	18
a. The state post-conviction corrective process fairly resolved the major factual issues and these findings were contradicted by the district court	18
b. The disregard of the district court for the state factual determinations was in violation of federal law, as well as the basic principles of federalism	21
c. The issues resolved by the district court that do not involve a square conflict with the state court factual determinations are insignificant, they were not decided by the Court of Appeals, and they should not bar the grant of certiorari to resolve the serious questions fairly presented	27
Conclusion	31

Table of Authorities Cited

Cases

	Pages
Fay v. Noia, 372 U.S. 391 (1963)	24
Imbler v. California, 379 U.S. 908 (1964)	5, 19
Imbler v. Craven, 298 F.Supp. 795 (C.D. Calif. 1969)	2, 19, 20, 21, 22, 28, 29
In re Imbler, 60 Cal.2d 554, 35 Cal.Rptr. 293 (1963)	passim
In re Imbler, 61 Cal.2d 556, 39 Cal.Rptr. 375 (1964)	5
Imbler v. Oliver, 397 F.2d 277 (9th Cir. 1968)	6
Johnson v. State of Florida, 283 F.Supp. 494 (S.D. Fla. 1968)	25
People v. Imbler, 57 Cal.2d 711, 21 Cal.Rptr. 568 (1962)	4
Peyton v. Rowe, 391 U.S. 54 (1968)	6
Simmons v. United States, 390 U.S. 377 (1968)	28
Townsend v. Sain, 372 U.S. 293 (1963)	24
United States ex rel. Feiu v. Deegan, 410 F.2d 13, (2d Cir.), cert. denied, 395 U.S. 935 (1969)	29
United States v. Keogh, 391 F.2d 138 (2d Cir. 1968)	29
Wilson v. Atchley, U.S. Sup. Ct., No. 642, Oct. Term 1969, cert. granted, 397 U.S. 905 (1970)	18

Codes

California Penal Code:	
Section 187	4
Section 245	4
United States Code:	
Title 28, Section 1254(1)	2
Title 28, Section 2241	5
Title 28, Section 2254(d)	passim
Title 28, Section 2254(d) (1) through (8)	3
Title 28, Section 2254(d)(8)	17

Texts

Pages

S. Rep. No. 1797, 89th Cong. 2d Sess. (1966), 3 U.S. Cong. & Adm. News, 3663, 3664 (1966) 21, 25

Bator, Finality in Criminal Law and Federal Habeas Corpus for State Prisoners, 76 Harv. L. Rev. 441, 455 (1963) 25

Bator, p. 452 26

Burger, "No Man Is an Island," 56 A.B.A.J. 325 (1970) 26

Wright and Sofaer, Federal Habeas Corpus for State Prisoners; The Allocation of Fact-Finding Responsibility, 75 Yale L. J. 895 (1966) 24

Wright and Sofaer, p. 922 25

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1969

No.

STATE OF CALIFORNIA and WALTER E. CRAVEN, Warden of Folsom State Penitentiary, *Petitioners,*

vs.

PAUL K. IMBLER, *Respondent.*

PETITION FOR WRIT OF CERTIORARI

to the United States Court of Appeals for the Ninth Circuit

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in this case on March 11, 1970.

OPINIONS BELOW

The opinion of the United States District Court for the Central District of California is reported as

Dubler v. Craven, 298 F.Supp. 795 (C.D. Calif. 1969), and is set forth in Appendix A. On May 22, 1969, the District Court denied a rehearing, and Order Denying Petition for Rehearing is set forth in Appendix B. The Court of Appeals opinion affirming the judgment of the District Court is set forth in Appendix C and is not yet officially reported. The order of the Court of Appeals amending the opinion of March 11, 1970, and denying petition for rehearing is printed in Appendix D hereto and is not yet officially reported.

JURISDICTION

The judgment of the Court of Appeals was entered on March 11, 1970, and the Petition for Rehearing filed by petitioners was denied on May 5, 1970. The jurisdiction of this Court is invoked under Title 28, United States Code section 1254(1).

QUESTIONS PRESENTED

1. Whether a federal district judge in a habeas proceeding by a state prisoner is bound by factual determinations made by the California Supreme Court after a full and fair evidentiary hearing in the absence of any of the vital defects set forth in Title 28, United States Code section 2254(d).

2. Whether a federal district judge in a habeas proceeding by a state prisoner can make factual determinations contrary to those made by the California Supreme Court after a full and fair hearing

without finding a defect in the state procedure as set forth in Title 28, United States Code section 2254(d) (1) through (8) *and* without conducting an evidentiary hearing upon which such contrary factual determinations could be based.

3. Whether determinations of ultimate facts—such as whether the prosecution *knew* perjured testimony was given at a criminal trial—are factual determinations binding upon the federal habeas court subject to the conditions set forth in Title 28, United States Code section 2254(d), or whether only the underlying factual detail is so binding, leaving the district court free to make its own factual determinations *de novo* of the ultimate issues in the guise of applying constitutional standards to historical facts.

4. Whether the Court of Appeals erred in failing to reverse the District Court in this particular case since all material factual determinations had been made by the California Supreme Court after a full and fair hearing, the District Court did not find a defect in the state process under Title 28, United States Code section 2254(d)(1) through (8), and the District Court purported to make factual determinations contrary to the state findings without conducting an evidentiary hearing upon which such factual determinations could be based.

5. Whether the federal habeas court erred in determining that there was a denial of due process in the failure of the prosecution to disclose purely negative evidence of little probative value when there was no deliberate suppression of such evidence, there was no

request for such evidence, and the evidence could not have changed the verdict.

STATUTE INVOLVED

The provisions of Title 28, United States Code section 2254(d), are set forth in Appendix E.

STATEMENT OF THE CASE

A. Proceedings in the state courts

On August 10, 1961, appellee Paul K. Imbler was sentenced to death for having committed the murder of Morris Hasson on January 4, 1961, in violation of section 187 of the Penal Code of the State of California, and on that same date he was sentenced to state prison for having committed the crime of assault with a deadly weapon in violation of section 245 of the California Penal Code, R. 173-174. Imbler had pleaded not guilty to the charges in the Superior Court of Los Angeles County and had been represented throughout by counsel, the Public Defender of Los Angeles County.

Since a death sentence had been imposed, Imbler's appeal was automatic to the California Supreme Court. The judgment of conviction was affirmed by that court. *People v. Imbler*, 57 Cal.2d 711, 21 Cal. Rptr. 568 (1962).

In 1963, Imbler filed a petition in the California Supreme Court seeking a writ of habeas corpus, *coram vobis*, or other appropriate relief, alleging the

knowing use of perjured testimony, the suppression of evidence, and newly discovered evidence. The California Supreme Court appointed the Honorable Thomas P. White, retired Associate Justice, as referee to take evidence directed to the claims presented. A hearing was held pursuant to this order and at all times Imbler was represented by counsel. Based primarily on the referee's report and findings, the California Supreme Court denied the petition. *In re Imbler*, 60 Cal.2d 554, 35 Cal.Rptr. 293 (1963). The United States Supreme Court denied a petition for a writ of certiorari. *Imbler v. California*, 379 U.S. 908 (1964).

In 1964, Imbler again sought habeas corpus in the California Supreme Court because of an error in the penalty phase of the trial (comment on possibility of parole). The writ was granted but limited to the issue of penalty only. The remittitur was recalled, and the judgment imposing the death penalty reversed insofar as it related to the penalty. In all other respects, the judgment was affirmed. *In re Imbler*, 61 Cal.2d 556, 39 Cal.Rptr. 375 (1964).

On January 11, 1965, in the Superior Court of Los Angeles County the penalty for the crime of murder in the first degree was fixed at life imprisonment.

B. Proceedings in the federal courts

Imbler filed a petition for writ of habeas corpus in the United States District Court for the Eastern District of California under Title 28, United States Code section 2241. The petition was denied by the

District Court without a hearing on the ground that it was premature. He attacked only the murder and assault convictions of April 10, 1961, as modified on January 11, 1965. In addition he was serving two other sentences at that time: One was a sentence for grand theft entered in Orange County on September 4, 1958. The other was a sentence for a conviction of robbery in the second degree in the Superior Court of Los Angeles County on February 6, 1961, for which the maximum sentence was life and no shorter term had been fixed by the Adult Authority.

The order denying the petition was reversed on appeal. The Court of Appeals relied on the decision of the United States Supreme Court in *Peyton v. Rowe*, 391 U.S. 54 (1968), which expressly permitted an attack by habeas corpus upon the second of two consecutive sentences, even though the prisoner would not be released if the attack were successful. The Court held that the rationale of that holding was equally valid where sentences were concurrent, ". . . at least where, as here, it appears that Imbler's custody under the life sentence for murder prevents his eligibility for parole consideration on his other convictions." Therefore, the order denying the petition was vacated and the cause remanded to the District Court for further proceedings. The Court of Appeals specifically declined to express any opinion on the merits of Imbler's contentions. *Imbler v. Oliver*, 397 F.2d 277 (9th Cir. 1968).

Upon remand, the cause was transferred from the Eastern District of California to the Central District

of California pursuant to Title 28, United States Code section 2241(d).

On April 23, 1969, the United States District Court for the Central District of California entered an order conditionally granting the petition for writ of habeas corpus. The order provided that, ". . . unless the State of California shall institute proceedings within 60 days from the date this order becomes final to retry the petitioner, a writ of habeas corpus will be granted by this Court." R. 594; Appendix A. Petition for Rehearing was denied on May 22, 1969. Appendix B.

The order of the District Court was appealed to the United States Court of Appeals for the Ninth Circuit by the petitioners. On March 11, 1970, the Court of Appeals filed an opinion affirming the judgment of the District Court. Appendix C.

Petitioners filed a Petition for Rehearing and Suggestion for Rehearing En Banc on March 25, 1970. By order filed on May 5, 1970, the petition for rehearing was denied and the opinion of March 11, 1970, was modified. Appendix D.

STATEMENT OF FACTS

The facts upon which the order of the District Court is based derive from the reporter's transcript of the murder trial and the reporter's transcript of the state habeas corpus evidentiary hearing, as well as the referee's report of the hearing. R. 562. No evidentiary hearing was held by the District Court.

A. The murder trial

The facts of the murder trial are ably summarized by former Chief Justice (then Associate Justice) Traynor of the California Supreme Court as follows:

> "On January 4, 1961, two men entered a Los Angeles market, one of them shot and fatally wounded Morris Hasson, the proprietor, and they departed in different directions. The only eyewitness to the crime, Hasson's wife, was unable to identify the man who did the shooting, but later identified his accomplice. A passerby, Alfred Costello, ran toward the market when he heard the shot, and at the lighted entrance encountered a man leaving the store with a gun in his hand. Costello chased the killer through several parking lots adjacent to the store; the killer shot at Costello and dropped his hat and coat while making his escape. A pistol, later identified as the murder weapon, a razor in a plastic case, and a soiled handerchief [sic] were in the coat.
>
> "Entirely on the basis of the identification testimony of several witnesses, petitioner was convicted of murdering Hasson in the perpetration of an armed robbery and of assault with intent to murder Costello. All attempts to tie the physical evidence at the scene of the murder to petitioner were fruitless, and a police expert testified that fingerprints on the murder weapon and on the razor and its case were too fragmentary to assign to anyone. Petitioner was identified as the man who left the store with a gun by Costello, who had seen the killer at the entrance of the store and again during the chase, by Billy Hillen, who was leaving the store as the two men entered

and who testified that he had clearly seen them again as they left, and by Alonzo Dunlap, who was an attendant at one of the parking lots through which the killer escaped. Hillen and Mrs. Hasson identified the other man at the killing as Leonard Lingo, an accomplice of petitioner in an attempted robbery in Pomona on January 14, 1961. During this January 14 attempt, Lingo was killed and another accomplice, Jerry Mayes, was captured. On January 15, Imbler surrendered to the Pomona police.

"Petitioner testified that he first met Lingo, whose identity as the accomplice of the killer was not disputed, on the morning of January 14 and that he spent the evening of January 4 with several other persons in various Los Angeles bars. Both alibis were corroborated by Mayes, his accomplice in the January 14 robbery attempt."

In re Imbler, 60 Cal.2d at 559, 35 Cal.Rptr. at 295-296.

B. The state habeas corpus proceeding

Where the resolution of factual issues is necessary to the determination of a petition for writ of habeas corpus or other collateral attack, the ordinary practice of the California Supreme Court is to appoint a referee to take evidence and make a report to the court of his findings. Those findings, while entitled to great weight, are not binding on the court.

The court appointed the Honorable Thomas P. White, retired Associate Justice of the court, as referee to take evidence directed to four questions.

"'1. Did any witness who testified against Paul Kern Imbler in the trial which resulted in the judgment of conviction, affirmed by this court in *People v. Imbler*, 57 A.C. 757 [57 Cal.2d 711 (2 Cal.Rptr. 568, 371 P.2d 304)], commit perjury as defined in the Penal Code of the State of California?

"'2. In the event that any witness did commit perjury, did any representative of the State of California cause or suffer such testimony to be introduced, knowing such testimony as given was perjured?

"'3. Did any representative of the State of California suppress or prevent the introduction of any evidence which, had it been given, would have been favorable to the defense of Paul Kern Imbler?

"'4. What if any new evidence has been discovered that undermines the case presented by the prosecution at the time of the judgment of conviction of Paul Kern Imbler?'"

In re Imbler, 60 Cal.2d at 560, 35 Cal.Rptr. at 296.

A hearing was duly held in Los Angeles pursuant to the order of the court. Imbler was represented by no less than five attorneys who called 15 witnesses and offered 49 exhibits. The respondents called 38 witnesses and offered into evidence 32 exhibits. The reporter's transcript of the proceedings is 1,085 pages in length. The District Court below found that the referee appointed by the California Supreme Court "conducted a full and adequate hearing." R. 561:31-32; Appendix A, *infra* at 3.

The major issue at the reference hearing involved the identification testimony of Alfred Costello. At the preliminary hearing and at the murder trial, Costello had identified Imbler as the man he chased, that is to say, the killer. At the reference hearing he testified that Imbler was not the man. In appraising this claim, the California Supreme Court correctly noted that the change in testimony alone did not constitute perjury. The pertinent inquiry was whether Costello testified at the trial contrary to his belief at that time. The referee found that he "testified of his own free will as to such identification based upon his own knowledge as disclosed by his testimony at both the preliminary examination and the trial of petitioner in the Superior Court." *In re Imbler*, 60 Cal.2d at 561, 35 Cal.Rptr. at 297. The referee also found that at no time either before or after the trial did Costello express to any representative of the State of California a doubt as to his identification of Imbler.

The California Supreme Court adopted the referee's findings:

> "We adopt both of these findings involving Costello's allegedly perjured identification. Although we are not bound by the findings of a referee (*In re Mooney*, 10 Cal.2d 1, 17 [73 P.2d 554]), they are entitled to great weight (*In re Riddle*, 57 Cal.2d 848, 853 [22 Cal.Rptr. 472, 372 P.2d 304]; *In re Martinez*, 52 Cal.2d 808, 812 [345 P.2d 449]; *In re Mitchell*, 35 Cal.2d 849, 855 [221 P.2d 689]). After a full hearing the referee disbelieved most, if not all, of the changes that Costello made in his trial testimony and the charges he made at the reference hearing. He

found that the testimony given by said Alfred J. Costello at the Reference Hearing, which varied from his testimony at the murder trial, was thoroughly impeached and discredited by numerous witnesses, while the testimony of said Alfred J. Costello, as given at the murder trial concerning his identification of Petitioner is corroborated by the testimony of witnesses Billy Hillen and Alonzo Dunlap, and is consistent with other circumstances in the case. . . . The referee had the opportunity to observe the witness and judge his credibility and demeanor. (See *In re De La Roi*, 27 Cal.2d 354, 364 [164 P.2d 10]; *In re Marrich*, 27 Cal.2d 503, 516 [165 P.2d 241].) The transcript of the hearing reveals many ambiguities and inconsistencies in Costello's testimony that convince us that the referee was fully justified in making this finding."

In re Imbler, 60 Cal.2d at 562, 35 Cal.Rptr. at 297.

Imbler also contended that Costello perjured himself at the trial when questioned about seeing photographs of Imbler. Costello claimed that he had been shown a mug shot of Imbler many times before the lineup where he was identified and that he had been shown mug shots several times before he helped in making a composite drawing of the killer which closely resembled Imbler and was admitted into evidence at the trial. The Supreme Court found that Costello was not induced to make a false identification, "unwittingly or otherwise," of Imbler, and that the evidence failed to establish that Costello wilfully gave false testimony at the trial about seeing Imbler's photo-

graph. *In re Imbler*, 60 Cal.2d at 564, 35 Cal.Rptr. at 298.

The Supreme Court found that Costello did make several false statements involving his credibility. He testified that he had only one felony conviction when in fact he had two. He testified that a commitment to a state mental hospital was voluntary, although the commitment was under section 1026 of the Penal Code when he was found not guilty of a criminal charge by reason of insanity. On redirect examination, he testified that he had received degrees from the University of California and the University of Southern California, a statement which was false.

The Supreme Court held, however, that Imbler had failed to prove knowledge of these falsehoods by representatives of the state. To the extent that knowledge might be charged to the prosecution from the "make sheet" of Costello, the defense attorney had the same "make sheet" in his possession during the trial yet failed to use it to correct the false testimony. *In re Imbler*, 60 Cal.2d at 565, 35 Cal.Rptr. at 299.

Imbler also contended that a police fingerprint expert perjured himself at the trial. The court found that there was no evidence that the expert intentionally gave false testimony at the trial. Even if the expert was negligent in his original analysis and testimony, his negligence did not deprive Imbler of a fair trial since the physical exhibit (a razor case) was available to Imbler throughout the trial for his own examination.

Imbler also made claims of the suppression of material evidence by the state. Of a number of claims all found without merit by the State Supreme Court, only one is relevant here. This was the charge that the police suppressed the fact that a co-employee of petitioner was unable to identify the coat dropped by the killer. The court held that evidence of this fruitless attempt to connect Imbler would have been, ". . . merely negative evidence of little probative value and could not have affected the outcome of the case." 60 Cal.2d at 568; 35 Cal.Rptr. at 301.

A number of other issues were raised in the state proceedings, but there seems no reason to discuss them since they were not pursued in federal habeas.

C. The decision of the District Court

After reviewing the reporter's transcript of the murder trial and the reporter's transcript of the evidence at the reference hearing in the state habeas corpus proceeding, without taking testimony from any witnesses or receiving any additional evidence, the District Court held that the judgment of conviction for the murder and aggravated assault should be set aside on the following grounds:

(1) That perjured testimony was knowingly used by the prosecution with specific reference to the witnesses Costello and Hillen. Six items of false testimony are specified in respect to the witness Costello. R. 574, 580, 586-587; Appendix A, *infra* at 17, 24-25, 32.

(2) The prosecution suppressed certain exculpatory fingerprint evidence. R. 590; Appendix A, *infra*, at 36.

(3) The prosecution failed to disclose certain evidence involving a coat that was exhibited to a fellow worker of Imbler's. R. 591-592; Appendix A, *infra* at 37-38.

The District Court declined to pass on claims relating to the pretrial lineup in light of its decision on the other issues and the failure of Imbler to exhaust his state remedies on those grounds. R. 592-593; Appendix A, *infra* at 38-39.

D. The Opinions of the Court of Appeals

On appeal, petitioners argued, *inter alia*, that the District Court had failed to give to the findings of fact of the California Supreme Court the deference required by Title 28, United States Code section 2254(d).

By opinion filed on March 11, 1970, the Court of Appeals affirmed the judgment granting the writ and filed a three-paragraph opinion, which reads as follows:

> "The district court ordered petitioner-appellee's application for habeas corpus granted unless the State instituted proceedings to retry petitioner within sixty days. *Imbler v. Craven*, 298 F.Supp. 795, 812 (C.D. Calif. 1969). Respondent-appellant contends that the district court failed to give the factual findings of the state court (*see In re Imbler*, 60 Cal. 2d 554, 35 Cal. Rptr. 293, 387 P.2d 6 (1963)), the weight to which they were entitled

under 28 U.S.C. § 2254(d), as amended November 2, 1966, Pub. L. 89-711, § 2, 80 Stat. 1105.'

"The identical contention was advanced on petition for rehearing in the district court. It was rejected by the district court with this comment: '[T]here is no major dispute as to the basic facts involved in this case. The events that transpired at petitioner's trial are clear; the only controversy that exists is as to so-called mixed questions of law and fact, and the conclusions of law as to federal questions. While this court gives the state findings of "pure" facts great weight where appropriate, it is not required to adopt them. *Townsend v. Sain*, 372 U.S. 293 (1963). As to most of such facts (that is, as to what actually happened at the trial), this court has accepted the state findings. It has not, and cannot, accept as binding the state court's conclusions as to mixed questions of law and fact and as to the legal consequences of those facts.'

"The district court's comment accurately reflects the record; and, so far as it goes, accurately defines the court's obligation under 28 U.S.C. § 2254(d). The district court did not spell out the standard it applied in the few instances in which it departed from the state court's findings of fact; but the district court's opinion clearly implies that the court concluded, in accordance with 28 U.S.C. § 2254(d)(8), that these factual determinations were not fairly supported by the relevant portions of the state court record considered as a whole." Appendix C.

Petitioners filed a Petition for Rehearing and Suggestion for Rehearing En Banc, contending, *inter alia*:

1. That the District Court opinion did not imply, clearly or otherwise, that the state court factual determinations—from which the Court of Appeals conceded the District Court had departed in a "few instances"—were not fairly supported by the relevant portions of the state court record considered as a whole; and even if this was so, then it was the duty of the Court of Appeals to review the validity of this legal conclusion.

2. That even if the District Court had properly concluded that the state court findings were vitiated under section 2254(d)(8), then the district judge could not make new factual determinations in the absence of an evidentiary hearing in the course of which he could have observed the witnesses and drawn inferences from the testimony. It was argued that, as the case stood, the district judge had made factual determinations, contrary to the state court findings, without hearing a single witness.

By order filed on May 5, 1970, the petition for rehearing was denied and the opinion of March 11 was amended. The Court of Appeals abandoned its earlier conclusion that the district judge had found that certain of the state findings were not supported by the evidence and were thus vitiated under section 2254(d)(8), and instead held, "that the court below accepted the 'historical-fact determinations' of the state court but reached different conclusions in applying federal constitutional standards to those facts." Appendix D, *infra* at 50.

REASONS FOR GRANTING WRIT OF CERTIORARI

THIS CASE PRESENTS A NUMBER OF IMPORTANT QUESTIONS OF FEDERAL LAW WHICH HAVE NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT. THE QUESTIONS REVOLVE AROUND THE BASIC QUESTION OF WHETHER A FEDERAL HABEAS COURT IS BOUND BY STATE COURT FACTUAL DETERMINATIONS REACHED AFTER A FULL AND FAIR HEARING UNLESS A VITAL DEFECT IS FOUND AS SET FORTH IN TITLE 28, UNITED STATES CODE SECTION 2254(d).

This case basically presents the question of whether a federal district court on habeas corpus by a state prisoner may, with the sanction of the Ninth Circuit Court of Appeals, totally disregard factual determinations by the California Supreme Court, fairly determined by post-conviction corrective process. We submit that this course of action is contrary to the letter and intent of the Habeas Corpus Act, specifically Title 28, United States Code section 2254(d), contrary to the needs of federalism, and contrary to the proper administration of our system of justice. The questions here presented are similar to those presented in *Wilson v. Mehley*, U.S. Sup. Ct., No. 642, Oct. Term 1969, *cert. granted*, 397 U.S. 905 (1970).

a. The state post-conviction corrective process fairly resolved the major factual issues and these findings were contradicted by the district court.

After the conviction of Paul Imbler in 1961 became final, the California Supreme Court initiated, upon his petition, extensive post-conviction proceedings to determine whether, as he claimed, perjured testimony had been knowingly used against him, evidence had been suppressed, and new material evidence had been discovered.

To determine these factual issues, the Honorable Thomas P. White, retired Associate Justice, was appointed as referee. Counsel was appointed for Imbler. Fifty-three witnesses testified. Fifty-one exhibits were received in evidence. The reporter's transcript is 1,085 pages in length.

The findings of the referee were adopted by the California Supreme Court and, in an opinion, resolved each of the issues then presented. *In re Imbler*, 60 Cal.2d 554, 35 Cal.Rptr. 293 (1963). Certiorari was denied by this Court. *Imbler v. California*, 379 U.S. 908 (1964).

In the proceedings before the federal habeas court six years later, the district judge heard no witnesses nor did he review any of the original evidence. He read the transcript of the trial and the transcript of the evidentiary hearing before the referee appointed by the California Supreme Court.

The district judge then made his own "findings":

(1) Where the California Supreme Court found that the witness Alfred Costello had not wilfully given false testimony at the trial about seeing Imbler's photograph (*In re Imbler*, 60 Cal.2d at 564, 35 Cal. Rptr. at 298), the District Court found that Costello did testify falsely (*Imbler v. Craven*, 298 F.Supp. at 800; Appendix A at 9).

(2) Where the California Supreme Court found that the prosecutor had no knowledge that the witness Costello lied when he denied a second felony conviction and that the defense counsel had possession of Costello's record of criminal convictions during the

trial (*In re Imbler*, 60 Cal.2d at 564-565, 35 Cal.Rptr. at 299), the District Court found as a fact that the prosecutor knew Costello's testimony in this respect was false (*Imbler v. Craven*, 298 F.Supp. at 804, 805; Appendix A at 13, 24).

(3) Where the California Supreme Court found that the witness Costello did not commit perjury when he testified that he was voluntarily committed to a state hospital in 1946 (*In re Imbler*, 60 Cal.2d at 565-566, fn. 3, 35 Cal.Rptr. at 299, fn. 3), the District Court found that Costello did commit perjury when he so testified (*Imbler v. Craven*, 298 F.Supp. at 800-801; Appendix A at 11-12).

(4) Where the California Supreme Court found that Costello did testify falsely about having earned certain university degrees but that the prosecutor had no knowledge of such perjury and had no reason to disbelieve such testimony (*In re Imbler*, 60 Cal.2d at 565, 35 Cal.Rptr. at 299), the District Court found that the prosecutor did know the testimony was false or had reason to believe the testimony was untrue (*Imbler v. Craven*, 298 F.Supp. at 808; Appendix A at 31).

(5) Where the California Supreme Court found that a fingerprint expert did not intentionally testify falsely at the murder trial that a fingerprint on a razor case found at the scene of the crime could not be assigned to anyone, although he testified at the evidentiary hearing two years later that the print could be identified and it was not Imbler's, and that any negligence by the expert in his original examina-

tion did not deny Imbler a fair trial since the razor case (and the fingerprints on it) were available for examination throughout the trial (*In re Imbler*, 60 Cal.2d at 566-567, 35 Cal.Rptr. at 300-301), the District Court found that evidence of the fingerprint on the razor case was suppressed (*Imbler v. Craven*, 298 F.Supp. at 810; Appendix A at 36).

b. The disregard of the District Court for the state factual determinations was in violation of federal law, as well as the basic principles of federalism.

The District Court flatly contradicted the state court factual determinations on the material issues and totally disregarded Title 28, United States Code section 2254(d).

Section 2254(d) was added to the Federal Habeas Corpus Act in 1966 to provide for a qualified application of the doctrine of *res judicata*. See S. Rep. No. 1797, 89th Cong. 2d Sess. (1966). A state court determination, made after a hearing on the merits, of a factual issue and evidenced by a written finding or opinion shall be presumed to be correct, unless the applicant did not receive a full, fair and adequate hearing—as specifically set forth in subparagraphs (1) through (7)—or unless the district court concludes that the determination is not fairly supported by the record in the state proceeding [subparagraph (8)]. The only way that a state prisoner can overcome the state court determination, unless one of the 8 conditions is met, is through establishing in an evidentiary hearing by convincing evidence that the state factual determination was erroneous.

The District Court did not find that the state court hearing was subject to a vital defect as specified in paragraphs (1) through (7). Indeed, the District Court found that the state court hearing was "full and adequate." *Imbler v. Craven*, 298 F.Supp. at 797; Appendix A at 3.

Nor did the District Court find that the state court determination was not fairly supported by the state court record as specified in paragraph (8). The Court of Appeals for the Ninth Circuit in its opinion of March 11, 1970, held that the District Court's opinion "clearly implies" that the factual determinations were not fairly supported by the record in those instances where the Court of Appeals conceded, without specification, that the District Court "departed from the state court's findings of fact." See Appendix C. However, a month later apparently further reflection convinced the Court of Appeals that the "implication" was neither so clear, nor even an implication, because in its opinion of May 5, 1970, it struck the paragraph of its opinion so stating. See Appendix D.

Thus, it is undisputed that none of the 8 conditions set forth in section 2254(d) as a ground for impeaching the state court findings was found, expressly or impliedly. Thus, we submit that by the express terms of section 2254(d) the state court factual determinations were binding on the District Court unless the prisoner in an evidentiary hearing established by clear and convincing evidence that they were erroneous. There was no such hearing nor any such determination by the District Court.

The Court of Appeals in its opinion of May 5, 1970, attempted to justify the District Court decision upon the theory that the district court simply applied federal constitutional standards to "historical" facts as found by the state courts. See Appendix D. This interpretation takes the heart out of section 2254(d) and stultifies the intent of Congress.

If "factual determination" in section 2254(d) means no more than the factual minutiae surrounding a claimed deprivation of federal constitutional rights, then it means nothing and renders all state post-conviction corrective procedure meaningless. If all the state court can determine with any binding effect is the factual detail—the name of the witness, the words that he uttered, the facts known to the prosecutor—then there is obviously no reason for the California Supreme Court to enlist a retired justice, appoint (and pay) counsel for the prisoner, call upon weeks of service from the Attorney General, prepare a transcript, analyze the evidence, hear argument and prepare an exhaustive opinion. If the role of the state court is only to record the evidence, then a court reporter could do the job at a fraction of the cost and without imposing upon the Justices of the California Supreme Court the duties of a scrivener.

It is manifest that Congress intended to require that the federal habeas court should respect the dignity of state court findings fairly determined on the ultimate factual issues, not simply the factual detail. Did a witness wilfully testify falsely? Did the prosecutor know the testimony was false? We know of no

federal constitutional standards that bear on such issues. Either the witness testified falsely or he testified truthfully. Either the prosecutor knew the testimony was false, or he did not know it.

It is clear that the federal constitutional standards applied by the California Supreme Court were correct. The basic doctrines underlying the knowing use of perjured testimony and the suppression of evidence were recognized by the California Supreme Court in 1963 and they remain the same today. Neither the District Court nor the Court of Appeals found any "change in law" that justified their decisions in this respect.

There can be no doubt that the 1966 amendment to the Federal Habeas Corpus Act which made section 2254(d) a part of that Act was intended to impose reasonable limitations upon the broad scope of federal habeas corpus as a remedy for state prisoners that had been established in *Fay v. Noia*, 372 U.S. 391 (1963) and *Townsend v. Sain*, 372 U.S. 293 (1963). These decisions had, even in the view of commentators sympathetic to the decisions, aggravated the tension in federal-state relations. Wright and Sofaer, *Federal Habeas Corpus for State Prisoners: The Allocation of Fact-Finding Responsibility*, 75 YALE L. J. 895 (1966). The proposed amendment carefully spelled out the effect to be given state court factual determinations made after hearing on the merits of factual issues and evidenced by adequate written indicia. The determination was to be presumed to be correct unless the petitioner could establish one of the 8 conditions.

The conditions are directed mainly to the validity of the state corrective process, rather than to the accuracy of the specific findings, an approach encouraged by the commentators. Wright and Sofaer, *supra* at 922; Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 455 (1963). Since none of the conditions for invalidating the state court factual determinations were met, there is no need to discuss these vital defects in detail.

The dignity given to state court factual determinations was for a threefold purpose: (1) To ease the burden on the federal courts with reference to needless evidentiary hearings; (2) to encourage the states to adopt adequate collateral remedies; and (3) to reduce the rising friction between the state and federal judicial systems. *Johnson v. State of Florida*, 283 F. Supp. 494, 497 (S.D. Fla. 1968); S. REP. No. 1797, 89th Cong. 2d Sess. (1966), 3 U.S. Cong. & Adm. News, 3663, 3664 (1966).

The refusal of the District Court and the Court of Appeals to give due deference to the state court findings not only violates federal law but vividly demonstrates the problems that Congress sought to prevent.

The goal of some semblance of finality for criminal judgments has been undermined. Nine years after the conviction and six years after the extensive state collateral proceedings, a state judgment has been set aside simply because a federal district judge came to different factual conclusions after reading some transcripts than did the California Supreme Court. The

goal of rehabilitation is deferred again. Chief Justice Burger has noted this problem:

> "No one should challenge any expense to afford a defendant full due process and his full measure of days in court. But reasonable people must be excused if they question a spectacle that extends ten years, costs a literal fortune and produces so little to help the accused or the public—the more so when after all this extended procedure we turn away and forget the person convicted." Burger, "*No Man Is an Island*," 56 A.B.A.J. 325 (1970).

Professor Bator has pointed out the impact of lack of finality upon the administration of justice:

> "A procedural system which permits an endless repetition of inquiry into facts and law in a vain search for ultimate certitude implies a lack of confidence about the possibilities of justice that cannot but war with the effectiveness of the underlying substantive commands. Furthermore, we should at least tentatively inquire whether an endless reopening of convictions, with its continuing underlying implication that perhaps the defendant can escape from corrective sanctions after all, can be consistent with the aim of rehabilitating offenders." Bator, *supra* at 452.

Moreover, the friction between the federal and state courts created by a decision of the kind here involved is both serious and needless. It is serious because it puts the state court and the federal judge in conflict on issues where the federal judge can claim no greater credentials nor competence, that is, on factual issues.

Indeed the state court had the better of it since the referee appointed by that court observed the witnesses and examined the evidence, making findings that were adopted by the state court. The conflict is needless because there are no constitutional issues involved, no federal constitutional doctrines that must be preserved. The prisoner is simply the incidental beneficiary of a difference of opinion on factual issues.

Finally, the decision at bar must frustrate those who contend that the state courts should energetically undertake the vindication of federal constitutional rights through post-conviction corrective process. Why bear the expense and endure the burdens when the decision is to be treated with indifference?

We submit that this Court should clearly resolve the questions here presented, make it clear that section 2254(d) means precisely what it says, restore the compatible federal-state relations essential to our form of government, restore some stability to criminal judgments, and encourage state efforts to implement the vindication of federal constitutional rights.

c. The issues resolved by the District Court that do not involve a square conflict with the state court factual determinations are insignificant, they were not decided by the Court of Appeals, and they should not bar the grant of certiorari to resolve the serious questions fairly presented.

The opinion of the District Court is discursive, it deals with a great number of issues, it is repetitious, sometimes inconsistent, and it does not attempt to assign weight to the various issues in its conclusion that the writ should issue. See Appendix A.

Some of the issues do not involve a conflict with the state court findings since the state court did not pass on them. The petitioner did not raise the question of failure to exhaust state remedies since it was felt that the issues were trivial and that this protracted litigation should be terminated.

In this connection the District Court determined that the eye-witness Billy Hillen testified falsely at the trial in July of 1961 that he did not remember seeing any photographs of Imbler since an investigating officer testified at the state evidentiary hearing that in January, some six months before the trial, Hillen had identified Imbler's photograph from a group of about a dozen photographs of persons of similar appearance. *Imbler v. Craven*, 298 F.Supp at 800; Appendix A at 10. While there was no proof that Hillen testified falsely to his lack of recollection, it is clear that the evidence of the photographic identification would have been helpful to the prosecution, not to Imbler. See *Simmons v. United States*, 390 U.S. 377, 383-384 (1968).

The District Court also determined that the witness Costello testified falsely that his earnings for the four years preceding the trial had averaged around nine to ten thousand a year, and that he was trying to straighten himself out. *Imbler v. Craven*, 298 F.Supp. at 803; Appendix A at 17. These statements are of such slight materiality that it seems certain that they were not of substantial consequence in the decision to grant the writ.

Finally, the District Court determined that the failure of the prosecution to disclose to the defense that a fellow worker of Imbler told the police that he had never seen him in a coat found at the scene of the crime was constitutional error. *Imbler v. Craven,* 298 F.Supp. at 811; Appendix A at 38. The District Court does not characterize this as "suppression" but simply "error." In this connection the California Supreme Court found no duty on the prosecution to report *sua sponte* to the defendant all that they learn about the case and that the evidence in question was merely negative evidence of little probative value that could not have affected the outcome of the case. *In re Imbler,* 60 Cal.2d at 568-569, 35 Cal.Rptr. at 301. It is clear that this evidence was not deliberately suppressed—there is no finding that it was suppressed at all—and there was no request for such evidence, so that the mere failure to disclose must be of critical proportions for the judgment to be set aside on collateral attack. As Judge Friendly observed:

> "To invalidate convictions in such cases because of a combing of the prosecutors' files after the trial has disclosed evidence possibly useful to the defense but not likely to have changed the verdict would create unbearable burdens and uncertainties." *United States v. Keogh,* 391 F.2d 138, 148 (2d Cir. 1968); see also *United States ex rel. Foin v. Deegan,* 410 F.2d 13, 20 (2d Cir.), *cert. denied,* 395 U.S. 935 (1969).

In the interests of caution, we have raised this issue as Question Presented, Number 5.

In our judgment, the conclusions of the District Court with respect to these trivial issues are clearly wrong. But even if this Court should agree with one or more of the District Court's determinations, these determinations cannot properly be considered as adequate and independent bases supporting the issuance of the writ. The major issues involve a conflict with the state court findings. The District Court did not so much as hint that the writ would have issued on the basis of the minor issues here discussed, and we can imagine no court finding a denial of due process on the basis of such issues. Our judgment is reinforced by the opinion of the Court of Appeals which discusses only the issues involving a conflict in factual determinations and the impact of Title 28, United States Code section 2254(d). See Appendices C and D. Since this case has come up through the federal courts, there is no question of the existence of an "adequate and independent state ground" supporting the judgment and impairing or defeating this Court's jurisdiction. Rather, the issues presented here involve the supervisory power of this Court over the lower federal courts and the exercise of that power is urgently needed.

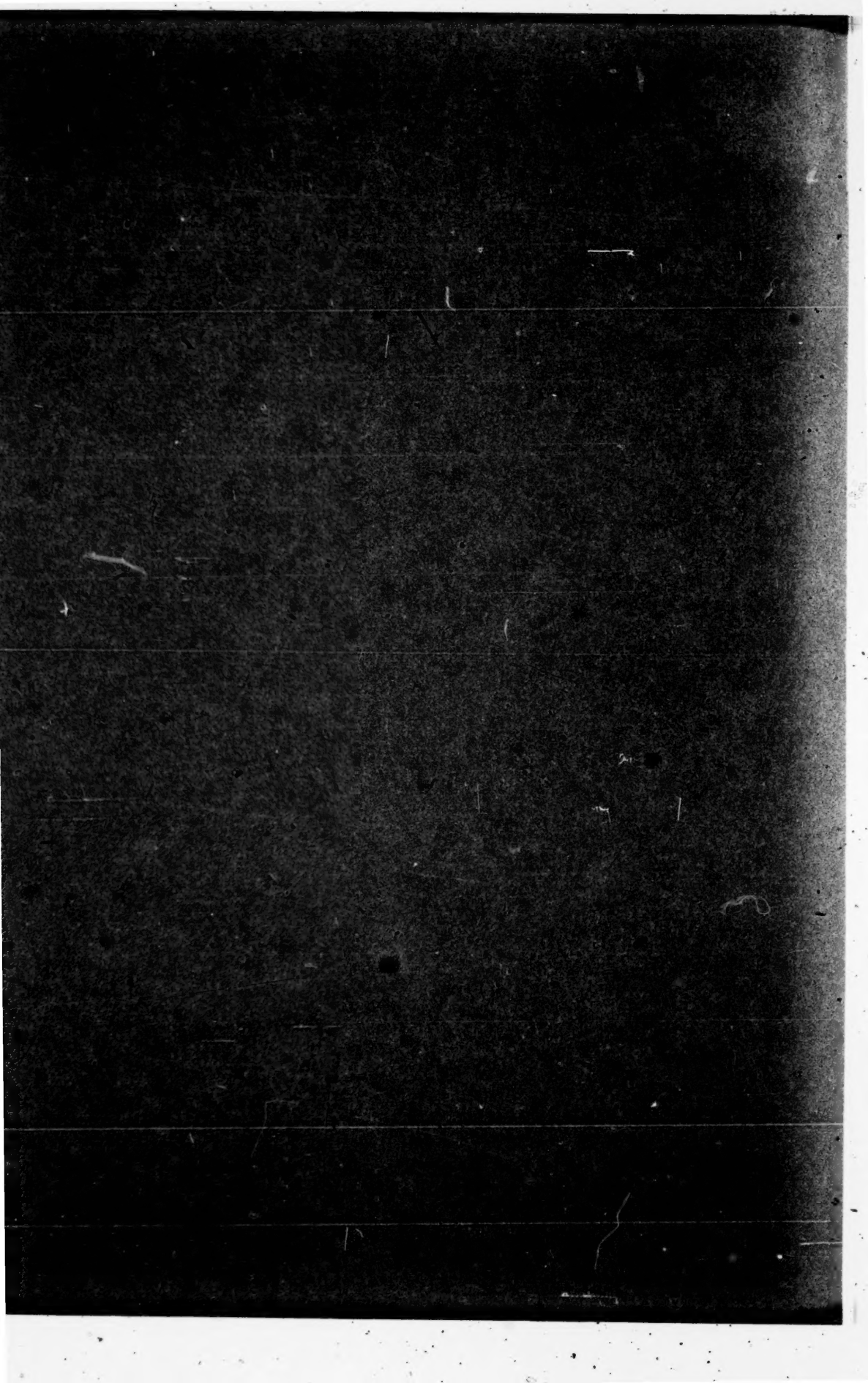
CONCLUSION

For the reasons expressed above, we respectfully submit that a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Ninth Circuit.

Dated: San Francisco, California,
June 8, 1970.

THOMAS C. LYNCH,
Attorney General of California,
ALBERT W. HARRIS, JR.,
Assistant Attorney General,
Attorneys for Petitioners.

(Appendices Follow)



Appendix A

In the United States District Court
Central District of California

Civil No. 68-1543-F

Paul Kern Imbler,
Petitioner,
vs.
Walter E. Craven, Warden of Folsom State Penitentiary, State of California,
Respondents.

MEMORANDUM OPINION AND ORDER CONDITIONALLY GRANTING PETITION FOR WRIT OF HABEAS CORPUS

Petitioner, a California state prisoner, seeks a writ of habeas corpus under 28 U.S.C. § 2254, challenging the validity of a judgment of conviction in two counts entered in the Superior Court in Los Angeles on August 10, 1961. The first count charged murder in the first degree, for which the jury fixed the penalty at death; in addition, petitioner was sentenced to a term of imprisonment not to exceed ten years on count two, assault with a deadly weapon with intent to commit murder. The judgment was affirmed by the California Supreme Court on automatic appeal [Calif.

Pen. Code § 1239(b)]. *People v. Imbler*, 57 Cal. 2d 711 (1962). Thereafter, petitioner sought a writ of habeas corpus in the California Supreme Court. The writ was denied on the basis of a referee's findings following an evidentiary hearing. *In re Imbler*, 60 Cal. 2d 554 (1963), *cert. denied*, 379 U.S. 908 (1964).

Petitioner then filed a second petition for a writ of habeas corpus in the state courts challenging solely the penalty of death. During the penalty phase of petitioner's trial, the prosecution stated to the jury that life imprisonment, because of the possibility of parole, did not necessarily mean permanent incarceration. The trial court instructed the jury that it could consider the possibility of parole after seven years' imprisonment in determining the penalty. Holding these statements and instructions to be improper, the California Supreme Court reversed the judgment imposing the death penalty. *In re Imbler*, 61 Cal. 2d 556 (1964). On remand, petitioner was sentenced to life imprisonment on the murder count.

The federal petition was originally heard in the Eastern District of California. The District Court there denied the petition, holding it to be premature under *McNally v. Hill*, 293 U.S. 131 (1931), since petitioner was also serving concurrent sentences under independent convictions not then being challenged. The Court of Appeals for the Ninth Circuit reversed the denial following the United States Supreme Court's overruling of *McNally v. Hill, supra*, in *Peyton v. Rowe*, 391 U.S. 54 (1968). *Imbler v. Oliver*, 397 F.2d 277 (9th Cir. 1968). Thereafter, the case was

transferred to this District pursuant to 28 U.S.C. §2241(d).

The petition for a writ of habeas corpus is conditionally granted for the reasons set forth herein.

I

A federal evidentiary hearing on petitioner's claims was not held since the same contentions were presented in the writ of habeas corpus before the California Supreme Court. A referee appointed by that court conducted a full and adequate hearing, and since there is no major dispute as to the basic facts, this court need not conduct a further hearing. *Townsend v. Sain*, 372 U.S. 293, 318 (1963); *Jackson v. California*, 336 F.2d 521, 522 (9th Cir. 1964).

The complete reporters' transcripts of petitioner's trial and of the state habeas corpus hearing, as well as the referee's report thereon, are part of the record herein and have been fully considered by this court.

II

About 8:30 on the evening of January 4, 1961, two men entered a Los Angeles grocery store owned by Morris Hasson. Mr. Hasson was, at the time, kneeling behind the counter. His wife, then also in the store, approached the apparent customers; by that time, Mr. Hasson had risen with a peculiar look on his face by which, his wife testified, she knew something was wrong. When she started to question him, she observed a gun barrel protruding from the coat of one of the men. As she asked what the men wanted, the gun was

fired, killing Mr. Hasson. The two men walked out of the store and headed in opposite directions, the gunman walking west.

Mrs. Hasson testified that the killer was wearing a hat and coat, and that she did not see his face and could not identify him. She subsequently identified the accomplice as one Leonard Lingo.

There was no physical evidence whatsoever connecting petitioner with the crime. The most significant evidence was the testimony of one Alfred Costello, called by the prosecuting attorney the "People's principal witness".

Mr. Costello testified that about 8:30 in the evening involved he was directly across the street from the Hassons' grocery store when two men in the store, one wearing a dark coat and a "slouched down" hat, attracted his attention. Costello stated he heard a shot and, as he walked across the street, he attempted to intercept the killer who he then noticed was holding a gun. At this point he was eight to twelve feet from the man, who then made a right-hand turn heading west. Costello identified him as petitioner. Costello testified that he followed the killer about 25 feet into an alley. The killer started to run, losing his hat. He hesitated, then entered a parking lot, Costello then yelled, "Stop or I'll shoot". The killer turned and fired at Costello who, standing 15-20 feet away, heard the bullet pass him and strike against a building. The killer then ran through the parking lot and finally into a third parking lot, Costello still following. Near the attendant's office of that lot, the man discarded his coat, then

doubled back through the alley and toward Hassons' store. Costello temporarily lost sight of him, then spotted him again going into a Y.M.C.A. building. Thereafter, Costello returned to the parking lot to recover the coat, and discovered the gun and a razor case in a pocket.

In addition, there was testimony from one Billy Hillen, who was leaving the Hassons' store as the killer and his accomplice were entering it. The men passed within four or five feet of Hillen. Hillen testified that petitioner was one of the men, wearing a brown overcoat and green hat, and that Lingo was the other. When he was about six or seven steps outside the store, Hillen heard a shot and turned back. He stated that petitioner was by that time standing outside of the store as Costello and a man named Fritz approached. Fritz said "jump him", but Hillen, who saw the gun, said to let him go.

The following day, Hillen recovered the hat worn by the killer.

Alonzo Dunlop, the third eyewitness, was an attendant in one of the parking lots through which the killer had run. Dunlop testified that he saw petitioner walk through his lot that night about 8:50 p.m. He said he heard no gunshots, although Costello stated the killer had fired at him in one of the adjacent parking lots. The only unusual sound he testified he did hear was the scream of Mrs. Hasson, and this only after the killer had left his lot. He further testified that he knew Costello by sight, but had not seen him in the lot that evening.

Ten days later, on January 14, 1961, petitioner, Leonard Lingo and one Jerry Mayes attempted an armed robbery of a service station in Pomona, California. Lingo died as the result of a traffic accident following the attempted robbery and Mayes was captured. Petitioner subsequently surrendered to the Pomona police.

Attempting to solve the Hasson murder case, the Los Angeles police showed Mrs. Hasson photographs of Lingo. She identified Lingo as the man who accompanied the murderer of her husband.

On January 30, 1961, prior to the trial, witnesses Costello, Hillen, Dunlop and Fritz were taken to a lineup. The lineup was conducted in four or five groups, with ten to twelve men in each group. When Hillen saw petitioner in the last group, he stated out loud, in the hearing of the other witnesses, "That's him". Hillen admitted making that statement, Dunlop testified as to it, and Costello also heard such a comment. Petitioner was then identified by the witnesses. Nevertheless, Hillen requested to see him wearing the hat and coat recovered from the vicinity of the murder. Several of the men were required to don the clothes, although there is some dispute as to whether any of them were similar in build to petitioner, and Hillen again identified petitioner.

Petitioner's defense was an alibi. He testified that he and three other persons, along with his girl friend for part of the evening, visited about five drinking or

dancing establishments, which he either named or described, from about 5:30 p.m. until after midnight on the day the murder occurred. He was able to identify fully only two of his companions: Jerry Mayes, who also testified about those activities although he found it difficult to be certain about the exact date, and one Robert Mahon. Also in the group were a man petitioner thought was named George, in whose car the group travelled from one place to another, and petitioner's girl friend, Ann, whose last name he could not recall.

In addition, while petitioner admitted to his participation in the Pomona robbery, he denied knowing Lingo before the 14th. He testified, as did Mayes, that the first time he and Mayes met Lingo was in the early morning of the 14th, the introductions having been made by a man named Dale who was not located at the time of trial.

Subsequent to the trial, investigation produced further corroboration by new witnesses both of petitioner's alibi and of his statement with regard to his first meeting with Lingo on January 14, ten days after the murder. The prosecution made these facts known to the Governor's office and the California Adult Authority (the state parole board), stating that "investigation has revealed a consistency in Imbler's position which is now corroborated by others". The man named Dale, who introduced petitioner and Lingo on January 14, had been found, and the owner of the car in which the drinking rounds were made on January 4th, whom

petitioner thought was named "George", was also located and corroborated the alibi.

III

Petitioner alleges that prejudicial error occurred during testimony of the witness Costello primarily, but not exclusively, involving that witness' credibility.

One instance of such error is claimed to be in the following testimony:

> "Q [By defense counsel] . . . Did you see any mug shots, as they are called, or small pictures of the defendant that you remember—Mr. Imbler—before you went to a line up?
>
> "A [By Costello] No.
>
> "Q Did the officers bring you out and show you a number of pictures?
>
> "A Well, I looked through the mug books, which is customary, I think.
>
> "Q You did look through a mug book?
>
> "A Yes.
>
> "Q You saw a number of pictures then of different people as possible suspects?
>
> "A Yes.
>
> "Q And among them were you able to find anybody that caused you to think this might be the person among the mug shots?
>
> "A Yes, but I kept that to myself. I didn't reveal it at that time.
>
> "Q Did you see any mug shots of the defendant particularly?
>
> "A I believe I did."

Thus, in Costello's testimony there appears a possible contradiction as to whether he saw pictures of

petitioner prior to the lineup. However, it is possible to interpret the testimony, and the jury may well have so interpreted it, as meaning that Costello did not see any mug shots of petitioner before the lineup, and was shown the "mug book" only after the lineup had already taken place. In fact, both Costello and Hillen were shown photographs of petitioner on January 25, 1961, five days prior to the lineup. Such pictures were not part of a "mug book", but were shown along with some twelve or so other pictures. At that time, on January 25th, Costello did not keep his identification to himself; rather, both he and Hillen identified Imbler as a "good possible suspect". Therefore, to the extent that Costello answered that he had not been shown pictures of Imbler, or at least did not see them apart from any "mug books", he was not telling the truth. At least one of the police officers involved in the investigation, who knew of petitioner's pictures being shown to the witnesses, was always present in the courtroom during the trial; yet no attempt was made to correct this inaccuracy. Although this court cannot conclude that Costello willfully perjured himself on this issue, it is clear that his answer was false and that the state, having knowledge of such falsity, permitted it to stand.

The witness Hillen similarly testified:

> "Q [By defense counsel] . . . Did the officers show you at any time some small pictures of different men to see if you could pick out a man from some pictures?
>
> "A [By Hillen] I looked at the mug books. That's standard procedure.

Again:

> "Q . . . [D]id you ever see any pictures of the defendant, if you remember?
>
> "A Not that I remember.

As indicated above, this answer was also false, and the state had knowledge of such falsity.

Further false testimony was given by Costello on matters relating to attempted impeachment of his testimony. In the following testimony on redirect examination, the prosecutor led Costello to testify concerning a previous "voluntary commitment" to a state mental hospital, when in fact the commitment had been mandatory upon a court adjudication of insanity:

> "Q [By District Attorney] Did you voluntarily commit yourself in 1946 to any of these state hospitals?
>
> "A [By Costello] Yes, I did.
>
> "Q And what were the circumstances of your voluntarily committing yourself?
>
> "A Well, in '46 and '47 when I was committed to Mendocino, I got in a little trouble with the law and I was represented by the Public Defender's Office at that time, and it was suggested to me that I enter a plea of not reasonably—not guilty by reason of insanity, and I was furnished a copy with the right answers to give the doctors at that time, which caused me to be committed to Mendocino."

Costello denied on the stand that he had been adjudicated insane, although both the prosecutor and defense counsel knew the denial to be false from a "make

sheet" each had in his possession. That denial, however, was stricken in order to allow the court to hear legal argument on the propriety of the inquiry. When Costello was subsequently asked if he knew, of his own knowledge, whether the commitment was based upon a finding of insanity, the prosecution's objection was sustained and the witness was not permitted to answer. The jury had already, however, heard Costello's denial, albeit subsequently stricken.

Thus the prosecutor, by leading the witness in regard to a *voluntary* commitment not only introduced erroneous testimony, but also succeeded in preventing the truth from being introduced.

At the state habeas corpus hearing, the prosecuting attorney testified that, so far as he could remember, he did not see the "make sheet" on Costello prior to trial. Just before Costello had taken the stand, the prosecutor had a short conversation with him, at which time Costello told him of a 1951 felony conviction; he did not at that time say anything about hospital commitments. The prosecutor further testified that he saw the "make sheet" for the first time when the public defender showed it to him before cross-examination of the witness. After seeing the "make sheet", he again talked with Costello, confronting him with the new facts. Costello then admitted to various mental hospitalizations, but told the prosecuting attorney that the 1946 admission was a *voluntary* commitment because he [Costello] had voluntarily pleaded innocent by reason of insanity knowing that the result would be hospitalization. Having had before him the "make

sheet" that stated that Costello had been "found insane now and at time of crime committed to Mendocino", the prosecutor testified about the discussion with the witness:

> "Mr. Costello told me that he was voluntarily committed. He gave me the reasons why he thought it was a voluntary commitment. Rather than argue with him, I just accepted his own wording by his statement that he pleaded not guilty to—by reason of insanity and was furnished certain answers by the Public Defender. In his mind, he thought it was a voluntary commitment. I wasn't going to argue with him. Let him explain it to the jury. The jury could make the decision. That was my attitude."

It therefore appears that the prosecutor in fact knew the commitment had not been voluntary, but, in deference to the witness, he not only refrained from using the term involuntary, but used the opposite and clearly erroneous term. Thus, whether he intended to do so or not, the prosecuting attorney knowingly created an incorrect impression of the most critical aspect of the commitment.

In addition, during cross-examination defense counsel attempted to elicit testimony of Costello's criminal record.

> "Q [By defense counsel] Mr. Costello, have you ever been convicted of a felony?
>
> "A [By Costello] Yes, I have. I am glad you asked that question.
>
> "Q And that was in 1951, was it?
>
> "A That's right.

"Q And another one in 1955, is that true?
"A No. You are wrong.
"Q Just one felony conviction, 1951?
"A That's right."

The "make sheet" which the prosecutor saw prior to the cross-examination indicated at least one other felony conviction to which defense counsel referred in the above testimony, and possibly others. However, on redirect examination, rather than correcting the false statement, the prosecutor perpetuated it:

"Q [By prosecutor] Now, you said that you were convicted of a felony in 1951. What felony was that?
"A [By Costello] Forgery."

The prosecutor admitted in the state hearing that he did not pursue, in his conversation with Costello prior to redirect examination, the leads suggested by the "make sheet". Thus, while the "make sheet" alone suggested that Costello might be a six-time felon, the prosecution "believed" Costello's statement that he was convicted only once. In summary, Costello's testimony concerning his felony convictions was false, and the prosecutor had information that it was false yet declined to introduce the truth.

On redirect examination of Costello, in an attempt to rehabilitate the witness, the prosecution elicited the following testimony, having previously been advised by Costello of it:

"Q [By prosecutor] Now, then, after your release from any of these hospitals, did you attend any universities or schools?

"A [By Costello] Yes, I did. I completed two years of my university training—a four year course in two years—and received a degree from the University of California.

"Q And what type of degree was that?

"A Industrial relations, and later on I went to night school at SC, and received an Engineer's degree.

"Q When was it that you received the Engineer's degree?

"A '54."

Costello further testified that his earnings for the past four years had "averaged around nine to ten thousand a year".

Such testimony was admittedly false. The prosecutor, however, at the state habeas corpus hearing, testified that, at the time of the trial, he did not know it to be false, and, having just been advised by Costello of that information during a recess, did not have sufficient time to verify it.

Petitioner contends that the prosecution *must* have known that this testimony, which it elicited, was false. He further argues that only through gross negligence could the prosecutor have failed to conclude that the testimony was perjured. If in fact the prosecutor did fail to draw that conclusion, petitioner argues that the state should nevertheless be charged with it. It is clear that the state had knowledge during the trial of the following facts about Costello:

1. That Costello had at least three previous convictions;

2. that in addition to his convictions he had been arrested on forgery and bad check charges on numerous occasions;

3. that he was committed to Mendocino State Mental Hospital on an adjudication of insanity in March, 1946;

4. that he was recommitted to Mendocino State Mental Hospital in February or March, 1949;

5. that he spent time in Camarillo State Mental Hospital in 1947 or 1948;

6. that at the time of trial there was a charge pending against him in Highland Park, California, for passing a bad check;

7. that at the time of trial there were outstanding checks to Mrs. Hasson and to the hotel at which he was staying, for which there were either insufficient funds or no bank account; and

8. that he was in prison under a 1951 conviction until November, 1953, although testifying that by 1954, one year after he was released from prison, he had received two degrees from two universities.

With actual knowledge of these facts, or at least having them directly before him, the prosecutor elicited from Costello the testimony that the witness received a university degree in industrial relations, completing a four-year degree in one-half the normal time, and a second full degree in engineering, a totally new and different academic subject, at a univer-

sity night school within a year after his release from prison.

In addition, Costello was allowed to testify that for the past four years his earnings averaged nine to ten thousand dollars a year, when in fact the prosecution knew that Costello had recently written bad checks for relatively small amounts, of which some were still outstanding and one of which was the basis of a pending criminal proceeding.

The police learned of these facts during their investigation of the case. Moreover, aside from their knowledge or communication thereof to the prosecuting attorney, the existence of the pending charge was also independently known to the prosecuting attorney. During a recess of the trial, he talked to two police officers from Highland Park who said they wanted to speak with Costello about the charge, and he asked them to wait until Costello was finished with his testimony.

The prosecutor's final attempt at rehabilitation came just three questions after he referred to the witness' single admitted prior conviction (although the prosecution knew there had been more than one conviction):

> "Q [By prosecutor] Incidentally, since you have been in trouble with the law have you been trying to straighten yourself out?
>
> "A [By Costello] Very much so."

This testimony was elicited despite the fact that the prosecutor knew of the pending Highland Park charge, had possession of Costello's "make sheet" which indicated at least two subsequent offenses and a

subsequent charge of parole violation, and had available knowledge of or actually knew of the other currently outstanding bad checks.

It is clearly established that a criminal conviction obtained through the prosecution's knowing use of perjured or false evidence violates the defendant's right to due process of law as protected by the Fourteenth Amendment to the federal constitution. *Mooney v. Holohan*, 294 U.S. 103, 112 (1935). See also, *e.g.*, *Giles v. Maryland*, 386 U.S. 66 (1967); *Napue v. Illinois*, 360 U.S. 264 (1959); *Alcorta v. Texas*, 355 U.S. 28 (1957); *Hysler v. Florida*, 315 U.S. 411 (1942); *Pyle v. Kansas*, 317 U.S. 213 (1942); *Evans v. Eyman*, 363 F.2d 540, 542 (9th Cir. 1966).

There is no doubt that false testimony was given at petitioner's trial by Costello in the following respects: as to whether Costello

(1) saw petitioner's mug shots prior to the lineup,

(2) was voluntarily or involuntarily committed to Mendocino State Mental Hospital in 1946,

(3) had previously been convicted of more than one felony,

(4) attended any universities or obtained any degrees therefrom subsequent to his release from the mental hospitals and from prison,

(5) earned an average of $10,000 a year for the four years preceding the trial, and

(6) had been trying to "straighten" himself out since he had been "in trouble with the law".

Further false testimony was given with respect to the mug shots from the witness Hillen.

In order, however, for such false testimony to warrant the relief here sought, it must have been material to the case. The court finds that the six enumerated items of false testimony were in fact material. The first item, relating to Costello's seeing petitioner's picture prior to the lineup, was material to the vital issue of identification. Each of the other items was material to the witness' credibility. It is no longer open to question that such materiality is within the constitutional rule set forth above. The Supreme Court conclusively settled that issue in *Napue v. Illinois*, 360 U.S. 264, 269 (1959):

> "The principle that a State may not knowingly use false evidence, including false testimony, to obtain a tainted conviction, implicit in any concept of ordered liberty, does not cease to apply merely because the false testimony goes only to the credibility of the witness. The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence. . . ."

The Court there cited with approval the following passage from *People v. Savvides*, 1 N.Y.2d 554, 557, 136 N.E.2d 853, 854-55, 154 N.Y.S.2d 885, 887:

> "It is of no consequence that the falsehood bore upon the witness' credibility rather than directly upon defendant's guilt. A lie is a lie, no matter what its subject, and, if it is in any way relevant to the case, the district attorney has the responsibility and duty to correct what he knows to be false and elicit the truth."

See also, *Giles v. Maryland*, *supra* at 74, and *Loraine v. United States*, 396 F.2d 335 (9th Cir.), *cert. denied*, 393 U.S. 933 (1968). The Court of Appeals in this Circuit has stated:

> "Evidence available for use at the trial may be material within the meaning of this rule, even though it goes only to the credibility of a witness."
>
> *Loraine v. United States*, *supra* at 339.

Cases granting relief for failure to make disclosure of evidence or for use of false evidence relating only to credibility are numerous. For example, in *Powell v. Wiman*, 287 F.2d 275 (5th Cir. 1961), the prosecution successfully objected to the introduction of any evidence of its key witness' mental condition, although it knew the witness had previously been in mental hospitals; that fact was not known to the defense. Such conduct was held to be a violation of the prosecution's duty. In *Ingram v. Peyton*, 367 F.2d 933 (4th Cir. 1966), the court held that the prosecution's apparently unintentional misnaming of its chief witness denied petitioner of a fair trial since it prevented his attorney from discovering the witness' prior criminal record, a matter relating solely to credibility.

See also, *United States ex rel. Hill v. Deegan*, 268 F. Supp. 580 (S.D.N.Y. 1967), where the key prosecution witness was presented as an honorably discharged veteran who, in addition, was receiving pension as a wounded veteran. This portrait of a good citizen tended to minimize the rather substantial variations that occurred in the witness' testimony. Al-

though at the time the prosecution did not know those facts were false, the court found that the prosecution already had reason to be wary of the witness' testimony. In addition, the prosecution had knowingly allowed certain additional false testimony to be given, which it allowed to stand until the witness himself corrected it. The *Deegan* case is similar to the one here in that the witness was permitted to create for himself a respectable, albeit false, background. Judge Frankel, in granting the petition for a writ of habeas corpus, remarked of the witness: "His gratuitous injection of these unchecked lies adds to the blemishes in an already infected record". 268 F. Supp. at 591. The same may be said in this case. Costello's testimony of his two degrees, his engineering position, and his $10,000 a year job was bound to have some effect in mitigating his less admirable, but factual, past history of which the jury was partially apprised. Thus, although only the witness' credibility was involved (except as to the mug shots), it was in this case extremely significant. It must be remembered that no physical connection between petitioner and the crime was ever established, causing the convictions to rest solely upon witnesses' identification of petitioner.

It is, therefore, readily apparent that the evidence here involved was material within the meaning of the rule. The California Supreme Court also concluded, for example, that Costello's testimony of his college education was material, although the state referee had concluded otherwise. That court stated that on the question of perjury the test of materiality is whether

the perjured testimony "could have probably influenced" the trier of facts. The court concluded that, "This testimony 'could have probably influenced' the jury to consider Costello rehabilitated after his capacity and competence as a witness had been put into question on cross-examination". *In re Imbler*, 60 Cal. 2d 554, 564-65 n. 2 (1963). This test of materiality is consistent with the general law as recognized by the federal courts: that is, whether the false testimony is capable of influencing the trier of facts. See, *e.g.*, *Luna v. Beto*, 395 F.2d 35, 38 (5th Cir. 1968); *United States v. Parker*, 244 F.2d 943, 950-51 (7th Cir. 1957), *cert. denied*, 355 U.S. 836 (1957); *Blackman v. United States*, 108 F.2d 572 (5th Cir. 1940).

Respondent argues that another element of this rule also prevents its application to the instant case: knowledge of the falsity of such evidence on the part of the prosecution. Respondent does not seriously dispute the falsity of Costello's statements. Instead, it is argued that the prosecution, in effect, acted in good faith and without knowledge that such testimony was false. Lacking such knowledge, the state contends it cannot be responsible for any perjured testimony. This court does not agree.

It should be noted at this point that while it is true that the Supreme Court cases have as yet discussed only the "knowing" use of perjured testimony, there is authority for the proposition that one convicted on the basis of perjured testimony has been deprived of due process even when the prosecution was unaware of the perjury. In *Jones v. Kentucky*, 97 F.2d 335

(6th Cir. 1938), it was held that a state is constitutionally required to provide a corrective remedy upon discovery of the perjury, and, absent such a remedy, federal habeas relief will be granted. There the state courts had held they lacked jurisdiction to grant the relief sought. The prosecutor did not know at the time of the trial that the testimony was false, and there was no suggestion that he should have known. Nevertheless, the United States Court of Appeals granted relief. See also, *Smith v. Warden, Maryland Penitentiary*, 254 F. Supp. 805 (D. Md. 1966); *United States ex rel. Montgomery v. Ragen*, 86 F. Supp. 382, 390 (N.D. Ill. 1949).

The position that a criminal conviction founded in part upon perjured testimony cannot be constitutionally permitted to stand, whether such perjury is discovered prior or subsequent to trial, is therefore not without authority. The prejudice resulting to a defendant so convicted is not eliminated by the state's ignorance. Nor can it seriously be contended that there is absent any "state action", necessary to invoke the Fourteenth Amendment's protection, in the procuring of a state criminal conviction.

It should also be noted that the Supreme Court has, in its supervisory capacity over the federal courts, held that a new trial is required when it is discovered subsequent to trial that a key government witness in a federal criminal case was not reliable. *Mesarosh v. United States*, 352 U.S. 1 (1956). The motion in that case had been made by the government. The Court recognized that ordinarily a defense motion for a new

trial alleging new evidence which is "merely cumulative or impeaching" will not afford defendant a new trial. But in that case, as here, the witness' unreliability is conceded by all parties, and it is not a case of mere cumulative evidence. The Court, in *Mesarosh*, stated:

> "The dignity of the United States Government will not permit the conviction of any person on tainted testimony. This conviction is tainted, and there can be no other just result than to accord petitioners a new trial.
>
> * * * *
>
> "The government of a strong and free nation does not need convictions based upon such testimony. The interests of justice call for a reversal of the judgments below with direction to grant the petitioners a new trial." [352 U.S. at 9, 14.]

This rule has been applied in the case of a collateral attack upon a federal conviction (via 28 U.S.C. § 2255 motion), *Mitchell v. United States*, 368 U.S. 439 (1962) (per curiam), and the California Supreme Court has been urged to adopt it by at least one justice of that court. *People v. Riser*, 47 Cal. 2d. 566, 583 (1956) (Carter, J., dissenting), *cert. denied*, 353 U.S. 930 (1957), *appeal dismissed*, 358 U.S. 646 (1959).

It is, however, under *Mesarosh*, still a rule applied only in the Supreme Court's supervisory capacity over federal trials, and despite the Court's statement that "there can be no other just result than to accord petitioners a new trial", the Court has not yet held that a different result would not comport with due process.

Thus, the current law in this Circuit, contrary to the holding in *Jones v. Kentucky*, 97 F.2d 335 (6th Cir. 1938), is that "knowledge" by the prosecution is required to support a claim of denial of due process based upon the existence of prejudicial perjured testimony in a criminal trial. *Timsanico v. United States*, No. 22,329 (9th Cir. Nov. 26, 1968); *Marcella v. United States*, 344 F.2d 876, 880 (9th Cir. 1965), *cert. denied*, 382 U.S. 1016 (1966); *Black v. United States*, 269 F.2d 38, 43 (9th Cir. 1959), *cert. denied*, 361 U.S. 938 (1960); *Taylor v. United States*, 221 F.2d 228 (9th Cir. 1955). This court need not consider the propriety of a departure from that rule since it finds the facts in this case to fall within it.

As set forth above, Costello's testimony was materially false in at least six respects. As to his false statement that he was "voluntarily" committed to a certain state hospital in 1946, when in fact he was committed because he had been adjudicated insane, this court finds that the prosecuting attorney had actual and definite knowledge that such statement was false. He not only permitted that statement to stand, an act itself expressly prohibited by *Napue v. Illinois*, 360 U.S. 264 (1959), but he purposely and intentionally led the witness to make it. Twice in his questioning, the prosecutor himself referred to the commitment as "voluntary", although his testimony at the hearing establishes that he indeed knew better. His justification for using that terminology, to be consistent with the witness' understanding of the situation, finds no basis in the law. Where a prosecutor

knowingly permits false evidence to be introduced in a trial, and such evidence will inevitably create a false impression in the minds of the jury, no legal justification for that misrepresentation can exist. If the prosecutor wished to avoid for the sake of convenience the term "involuntary", he could have readily done so; there was absolutely no necessity for a substitute adjective, and use of an erroneous one was highly improper. The prosecutor also stated that he intended to let the jury "decide" with respect to the voluntariness of the commitment, having presented to them the "facts". The one fact, however, which he had, and which the jury did not, was that the commitment was not voluntary.

Nor can it be said that there was at least some question about the nature of the commitment, and that the jury, having the "facts," was competent to judge the issue. It is not only affirmative misrepresentations which the prosecutor is prohibited from employing to secure a conviction; omissions and half-truths are equally damaging and prohibited, and their use is no less culpable. *Jackson v. Wainwright*, 390 F.2d 288, 298 (5th Cir. 1968). Creating an inference that a fact exists when in fact to the knowledge of the prosecution it does not, constitutes the knowing use of false testimony. *E.g., Turner v. Ward*, 321 F.2d 918, 920-921 (10th Cir. 1963).

> "Evidence may be false either because it is perjured, or, though not itself factually inaccurate, because it creates a false impression of facts which are known not to be true." *Hamric v. Bailey*, 386 F.2d 390, 394 (4th Cir. 1967).

The court, in *Hamric*, recognized that the witnesses giving false testimony may have innocently done so through a lack of perception. Nevertheless, the state knew such testimony to be false, and failed to bring the true facts to the jury's attention. The conviction was held to violate the Fourteenth Amendment.

The prosecution here also had knowledge of the fact that both Hillen and Costello had seen pictures of petitioner prior to the lineup. Such knowledge is conclusively indicated by the police log. One of the investigating police officers was present at the trial. Even assuming that the prosecuting attorney himself did not have such knowledge, the application of the rule is not precluded, for the prosecution is charged with the knowledge of its agents including the police. This principle is no longer subject to serious dispute. As it was held in *Barbee v. Warden, Maryland Penitentiary*, 331 F.2d 842; 846 (4th Cir. 1964):

> "Failure of the police to reveal such material evidence in their possession is equally harmful to a defendant whether the information is purposely, or negligently, withheld. And it makes no difference if the withholding is by officials other than the prosecutor."

The court there held that if the police failed to make proper disclosure, they were participating in the deception. Unlike the situation in *Luna v. Beto*, 395 F.2d 35, 40 (5th Cir. 1968), which distinguished its facts from those in *Barbee*, an investigating police officer in the case here was present in the courtroom, and was able to hear the testimony given. He could easily have

corrected any misstatements of fact, or have brought the same to the prosecutor's attention. His action is no less that of the state than the actions of a prosecuting attorney. The contention that knowledge of perjured testimony must in fact be "brought home to the prosecuting officers" was expressly rejected in *Curran v. Delaware*, 259 F.2d 707, 712-13 (3d Cir. 1958), *cert. denied*, 358 U.S. 948 (1959), the court resting its decision upon *Pyle v. Kansas*, 317 U.S. 213 (1942). It is clear that the term "prosecution", for this purpose, includes at least the investigating officers as well as the attorneys. See also *United States v. Consolidated Laundries Corp.*, 291 F.2d 563, 570 (2d Cir. 1961), where even the conduct of government clerks was held to result in denial of due process; *Estes v. United States*, 254 F. Supp. 314, 318 (W.D. Tex. 1966).

The fact that Costello had been convicted of more than one felony was also known to the prosecuting attorney. He admittedly examined the witness' "make sheet", which indicated *at least* two others. At the state hearing the prosecutor somewhat evasively testified that he had examined the "make sheet", but stated he had looked at it "as a whole", and not to its specific parts. Respondent cannot deny knowledge of facts which it had before it and which its agent admittedly examined. That the agent may have ignored those facts does not relieve the state of its responsibility. This is not mere negligence in failing to ascertain the facts. It is, at best, deliberate failure to take full notice of their significance. Thus, this

case is vastly different from *Taylor v. United States*, 229 F.2d 826 (8th Cir.), *cert. denied*, 351 U.S. 986 (1956), in which petitioner attempted to charge the prosecution with "implied" knowledge of the contents of certain Narcotics Bureau records which allegedly would have refuted what a witness told Narcotics Agents. Here, petitioner need not rely on the mere existence of official records. The facts with which respondent is charged were either in fact known to the prosecuting attorney, the investigating officers, or were contained in documents which the prosecutor had actually examined.

By virtue of the same principles, the prosecution had reason to believe that Costello had not been attempting to "straighten out". Therefore, by asking Costello whether he had been so doing, the prosecutor knowingly attempted to create an impression in the minds of the jurors which he knew was false. For example, as discussed above, the prosecutor personally knew of the pending bad check charge against Costello. In addition, he had examined the witness' "make sheet" which indicated, among other things, two offenses and a parole violation in the period of time involved, and the police officers (who had been present at the trial) knew of additional bad checks issued by Costello that were still outstanding.

The final items of Costello's false testimony are the references to the witness' two alleged university degrees and his claimed annual income. This court has above described the facts known by the prosecutor about Costello. For a man with a history of felony

convictions and state mental hospital commitments, such a success story is highly suspect, particularly when coupled with the known fact that Costello had been in prison until November of 1953, and yet he claimed to have received his second degree, through night school, at a university in 1954. This rather incredible story was given in full to the jury as the result of leading questions by the prosecutor.

While the prosecutor claimed not to have disbelieved these outright lies, he clearly had cause to suspect them. The reckless use of highly suspicious false testimony is no less damaging or culpable than the knowing use of false testimony, and a conviction based upon such evidence must suffer the same consequence.

Although there are no cases directly holding that testimony which should have been known to be false falls within the prohibition against the knowing use of perjured evidence, a number of cases have directed their inquiries based upon that principle. Thus, for example, in *McCloskey v. Boslow*, 349 F.2d 119, 121 (4th Cir. 1965), it was held that the allegation that the prosecuting attorney should have known that certain testimony was perjured raises factual issues and "legal questions concerning the state's responsibility for the accuracy of what Dr. Boslow said". Again, in *Wild v. Oklahoma*, 187 F.2d 409, 410 (10th Cir. 1951), the court recognized this principle in finding that:

> "In the case before us there is no suggestion that the prosecuting officers knew or had reason to believe that any of the testimony offered at the trial of the petitioner was false or perjured."

See also *Smith v. Warden, Maryland Penitentiary*, 254 F. Supp. 805 (D. Md. 1966).

Moreover, in cases where evidence favorable or helpful to the defense has been withheld, due process has consistently been held to be violated even if the evidence is only negligently withheld. That rule was stated in *Thomas v. United States*, 343 F.2d 49, 53-54 (9th Cir. 1965):

> "The well-recognized rule thus invoked is that a conviction cannot stand where a prosecutor has, either wilfully or negligently, withheld material evidence favorable to the defendant. As the Second Circuit said [in *United States v. Zborowski*, 271 F.2d 661, 668 (2nd Cir. 1959)]:
>
> "'The prosecutor must be vigilant to see to it that full disclosure is made at trial of whatever may be in his possession which bears in any material degree on the charge for which a defendant is tried.'"

See also, *e.g., Ingram v. Peyton*, 367 F.2d 933 (4th Cir. 1966); *Levin v. Katzenback*, 363 F.2d 287 (D.C. Cir. 1966); *Barbee v. Warden, Maryland Penitentiary*, 331 F.2d 842 (4th Cir. 1964); *United States v. Consolidated Laundries Corp.*, 291 F.2d 563 (2d Cir. 1961); *United States v. Birrell*, 276 F. Supp. 798, 817-18 (S.D.N.Y. 1967); *United States v. Sobleu*, 203 F. Supp. 542 (S.D.N.Y. 1961), *aff'd*, 301 F.2d 236 (2d Cir.), *cert. denied*, 370 U.S. 944 (1962); *United States v. Heath*, 147 F. Supp. 877 (D. Hawaii 1957), *appeal dismissed*, 260 F.2d 623 (9th Cir. 1958) (approving the district court's holding) (the *Birrell* and *Heath* cases involving apparently inadvertent loss of certain documents).

It would hardly be logical, in light of those cases, to hold a prosecutor to a lower degree of diligence with respect to the introduction of false evidence.

Nevertheless this court need not now decide whether mere negligence in allowing this false testimony to be given would warrant the relief here sought. In this case, more than mere negligence has been established. The prosecutor either had reason to believe or in fact knew that each item of evidence discussed above was untrue. The state cannot now disclaim knowledge of such falsity on the ground that its agent, the prosecutor, ignored the facts before him or that the investigating officers failed to disclose those facts to him. Due process of law does not tolerate a prosecutor's selective inattention to such significant facts. It requires that he exercise good faith in prosecuting that case. Such good faith is not fulfilled where the prosecutor allows his witness to give false testimony of which he has advance knowledge and the accuracy of which he has reason to suspect. The duty of good faith is not merely a negative one, to omit from one's case outright lies. It imposes as well an affirmative duty to avoid even unintentional deception and misrepresentation, and in fulfilling that duty the prosecutor must undertake careful study of his case and exercise diligence in its preparation, particularly where he is confronted with facts tending to cast doubt upon his witness' testimony. The prosecutor's objective is justice; his role is not that of a mere advocate. The goal of justice is hardly satisfied by less.

Therefore, as to each of the six items of false testimony described above, the court finds that the prosecution had knowledge of such falsity, or, if he did not have actual knowledge, that he had reason to believe such testimony was false and his reckless use thereof in disregard of such reason is to be treated the same as knowing use of false testimony.

IV

Respondent's position is that any errors allegedly committed by the prosecution could have been cured by action of defense counsel. Thus, it is argued that if Costello's testimony, for example, of his university education was suspect, defense counsel should have cross-examined the witness on that issue. It is clear that defendant's public defender should have done so. Nevertheless, his failure to do so will not bar relief. A criminal trial is not a sporting event nor a game of wits. See, *e.g.*, *Giles v. Maryland*, 386 U.S. 66, 100 (1967) (Fortas, J., concurring):

> "A criminal trial is not a game in which the State's function is to outwit and entrap its quarry. The State's pursuit is justice, not a victim."

See also *Levin v. Katzenback*, 363 F.2d 287, 291 (D.C. Cir. 1966); *Curran v. Delaware*, 259 F.2d 707, 711 (3d Cir. 1958), *cert. denied*, 358 U.S. 948 (1959).

It is true, as respondent urges, that the prosecution is not required to prepare defendant's case. See *United States v. Gleason*, 265 F. Supp. 880, 884 (S.D.N.Y. 1967). Nevertheless, the failure of defense counsel to conduct an effective cross-examination, unless a de-

liberate trial tactic, cannot cure constitutional, prejudicial error committed by the prosecution. The fact that a more diligent counsel might have cured that error does not negate it. See *Levin v. Katzenback*, 363 F.2d 287, 291 (D.C. Cir. 1966). See also the concurring opinion of Justice White in *Giles v. Maryland*, 386 U.S. 66, 82 (1967), wherein he noted that, "Had petitioner's counsel been *less* diligent, the false testimony might rise to the level of a *Napue* violation" (emphasis added). This is not a case such as *United States v. Sobell*, 142 F. Supp. 515 (S.D.N.Y. 1956), *aff'd*, 244 F.2d 520 (2d Cir.), *cert. denied*, 355 U.S. 873 (1957), where it may be said that defense counsel's failure to cross-examine a witness with respect to a particular issue was a matter of specific and deliberate strategy for which defendant, upon hindsight, cannot now complain.

V

Petitioner further contends that the prosecution suppressed certain exculpatory fingerprint evidence contained on a razor case. The case was found in the coat discarded by the killer. At the trial, a police fingerprint expert testified that he found two fragmentary prints on the case, but that they were not sufficient to permit a comparison with any other prints. He stated that there was more than one point of identification in each fragment "constituting possibly three or four points", but that at least ten points are needed for an identification. In addition, he agreed with the prosecutor's statement that if he did have a

fingerprint exemplar, it would not have done "any good" because he didn't have a sufficient fragment.

After the trial, an expert working on petitioner's behalf discovered a *third* fingerprint on the razor case. The third print was positively identifiable and is admitted not to be petitioner's. All the evidence indicates that this print was in fact on the case at the time of trial.

At the state habeas corpus hearing, the police fingerprint expert was reluctant to admit to the existence of the third print. He first testified that, as he "recalled", there were two fingerprints on the razor case. Upon viewing the case, however, he added, "In my testimony a moment ago I said that there were two. I see that there are three, actually." When asked whether the third print could be identified, he stated that he didn't "believe so". He further testified, after viewing an unmagnified photograph of the print, that he was unable to say whether or not the print was petitioner's. Exemplars of petitioner's prints were then given to him during noon recess at which time he compared them with a *magnified* photo of the third print. His testimony about that second examination was somewhat evasive:

> "Q [By petitioner's counsel] [D]id I show you at noon the prints of Mr. Imbler that were made by Mr. Meyers, I believe it was, the other day?
>
> "A [By police fingerprint expert] Yes, I glanced at them.
>
> "Q Did you look at them and compare them with the photograph of the print appearing on the inside of the razor case?

"A No. I didn't make an accurate comparison.

"Q Did you make enough of an examination to draw a conclusion as to whether or not the magnified photograph is one of the prints appearing on the exhibits that were prepared by Mr. Meyers?

"A I would say that they weren't.

"Q Well, did your make enough of an examination to form an opinion, then?

"A That is a more or less casual opinion. As I say, I didn't compare it with a magnifying glass, but I would say that they weren't, generally."

Thus, while the state's expert was unable to make a definite statement with regard to the unmagnified pictures, he was able to conclude, albeit reluctantly, that the print as it appeared in the magnified photo was not petitioner's. After later examining the prints during an overnight recess, he finally made a clear and unqualified statement that the third latent print was not petitioner's.

His testimony raises an additional problem. He stated that the first two latent prints were too fragmentary to be of "any good", even if compared with exemplars. Nevertheless, he did in fact make such comparisons, as admitted in his testimony and shown by police logs of the investigation.

Thus, the function apparently served by fingerprint testimony was to imply to the jury that the prints on the razor case *might* have been petitioner's. Had the jury known that the third print on the case was not petitioner's, they clearly would have reached a different conclusion with respect to this evidence.

The court finds that evidence of the third fingerprint was suppressed. The referee at the state hearing found, however, that such evidence was equally available to defendant at the trial. The California Supreme Court adopted that conclusion, stating in addition that although in some cases the negligence of one of the state's representatives may result in a denial of a fair trial, in this case it did not. The court stated that "[the police investigators'] negligence has obstructed the defendant in challenging the case against him, it is not a ground for collateral attack", and added that the razor case had been available to petitioner during the trial. *In re Imbler*, 60 Cal. 2d 554, 567 (1963). This court respectfully disagrees.

> "The suppression by the prosecution at the trial, of evidence favorable to an accused violates due process where the evidence is material either as to guilt or punishment, irrespective of the good or bad faith of the prosecution [citations omitted]."

Lorraine v. United States, 396 F.2d 335, 339 (9th Cir.), *cert. denied*, 393 U.S. 933 (1968). See also *Brady v. Maryland*, 373 U.S. 83, 87 (1963); *Miller v. Pate*, 386 U.S. 1 (1967).

There can be no doubt that had evidence of the third print been deliberately suppressed by the police, even if the prosecuting attorney was not aware of its existence, due process would clearly have been violated. See, for example, *Barbee v. Warden, Maryland Penitentiary*, 331 F.2d 842 (4th Cir. 1964), where the police had suppressed the results of fingerprint and ballistics analyses which tended to cast doubt upon whether

the gun allegedly used was in fact the murder weapon. The same result follows if the material is negligently suppressed.

As our Court of Appeals has stated in *Thomas v. United States*, 343 F.2d 49, 53 (9th Cir. 1965):

> "[A] conviction cannot stand where a prosecutor has, either willfully or negligently, withheld material evidence favorable to the defendant."

As to negligent suppression, see also the cases cited *supra* p. 26.

VI

Costello testified that as the killer fled he discarded his coat, which Costello later recovered and turned over to police. At the trial, the recovered coat was identified by Mrs. Hasson, as well as by Costello and Hillen as that worn by the killer.

Prior to trial, police exhibited the coat to a fellow worker of petitioner who testified at the state habeas corpus hearing that he had told police he had never seen petitioner wearing such a coat, or anything like it. This evidence, petitioner contends, should have been disclosed to him.

The California Supreme Court stated that this evidence, tending to prove that the coat was not petitioner's, "would have been merely negative evidence of little probative value and could not have affected the outcome of the case". *In re Imbler*, 60 Cal.2d 554, 568 (1963).

The state, at oral argument, explicitly conceded that failure of the prosecution to disclose this evidence to

the defense was error. The same admission is made by implication in the remarks of the California Supreme Court. However, the state contends that such error was harmless.

The federal harmless error test, to be applied to constitutional errors, requires, as noted below, in order to find such an error harmless, that the court be able to declare it harmless beyond a reasonable doubt. Because no physical connection between the tangible evidence and petitioner was made, and because the jury was prevented from hearing any testimony tending to negate any such connection, although such testimony was available, such a declaration in this case is impossible. To hold otherwise would be to indulge in pure speculation, and would be a clear violation of the federal standards. See, for example, *United States ex rel. Hill v. Deegan*, 268 F. Supp. 580, 591 (S.D.N.Y. 1967).

The court similarly dispenses with the argument that such evidence concerning the coat was equally available to petitioner. The record in this case nowhere indicates that petitioner even knew of the coat's existence before it was introduced at the trial. If petitioner is in fact innocent, he would not have known there was a coat involved, and it was therefore, for all practical purposes, not available to him. See *Lee v. United States*, 388 F.2d 737 (9th Cir. 1968).

VII

Petitioner has raised substantial questions concerning his rights at the pre-trial lineup procedure during

which he was identified. See, *e.g.*, *Foster v. California*, 37 U.S.L.W. 4281 (U.S. Apr. 1, 1969). However, this court need not rule upon those contentions in light of its decision on the other issues. Moreover, petitioner has failed to exhaust his state remedies on these grounds, and this court therefore declines to consider their merits.

VIII

The harmless error doctrine, as applied to federal constitutional error, is set forth in *Chapman v. California*, 386 U.S. 18, 24 (1967):

> "[B]efore a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt."

Although the Supreme Court stated it was merely adhering to the test provided in *Fahy v. Connecticut*, 375 U.S. 85, 86 (1963) (whether there was a reasonable possibility that the evidence might have contributed to the conviction) its restatement of the rule in fact appears to be more stringent. It should be noted that *Chapman, supra,* was not decided until after the California Supreme Court's adverse determination of petitioner's claims.

The California Supreme Court is without question at the forefront of advancing and protecting the constitutional rights of the accused. Although this court cannot give a state court's conclusions of law as to federal constitutional questions binding effect, *Townsend v. Sain*, 372 U.S. 293, 318 (1963), determinations of the California Supreme Court in this field have

earned much respect and deserve great weight. Nevertheless, this court must draw independent conclusions of law, and, in light of the United States Supreme Court's recent restatement of the federal harmless error rule, it must respectfully disagree with the California court.

The total and cumulative result of all the constitutional errors committed at petitioner's trial prohibits a declaration that, beyond a reasonable doubt, those errors were harmless. This court finds upon review of the record of the entire trial that petitioner was denied a fair trial, and that his federally protected right to due process of law was thereby violated. Even if evidence of petitioner's guilt were overwhelming, the right to a fair trial may not be abrogated. *Jackson v. California,* 336 F.2d 521, 523 (9th Cir. 1964).

Therefore, this court concludes that the harmless error doctrine does not save petitioner's conviction.

IX

ORDER

It is the order of the court that unless the State of California shall institute proceedings within 60 days from the date this order becomes final to retry the petitioner, a writ of habeas corpus will be granted by this court.

It is Further Ordered that the court reserves jurisdiction over the parties in regard to this cause.

It is Further Ordered that the clerk this day shall serve copies of this order by United States mail upon

the Attorney General of the State of California, the respondent, petitioner and his counsel, the District Attorney of Los Angeles County, the Honorable Joseph A. Wapner, Presiding Judge of the Superior Court of Los Angeles County, and the Honorable William B. Keene, Presiding Judge of the Criminal Courts Department of the Superior Court of Los Angeles County.

April 21, 1969.

Warren J. Ferguson,
United States District Judge.

Filed, April 23, 1969,
Clerk, U.S. District Court,
Central District of California.

Appendix B

In The United States District Court
Central District of California

Civil No. 68-1543-F

Paul Kern Imbler,
Petitioner,
vs.
Walter E. Craven, Warden of Folsom State Penitentiary, State of California,
Respondent.

ORDER DENYING PETITION FOR REHEARING

The court has previously entered an order conditionally granting a petition for a writ of habeas corpus. Respondent now seeks a rehearing.

I

Respondent contends that this court should have granted an evidentiary hearing on the petition herein. This contention is contrary to his position taken prior to the court's ruling. Respondent in his return conceded that a new and different evidentiary hearing before this court was not necessary. He conceded that this court could properly determine all issues based upon the transcripts of the state proceedings.

A fair, full and adequate evidentiary hearing was held by the state supreme court upon the same contentions. The hearing was fully litigated and contested, counsel appearing for both parties, and all facts were adequately developed with respect to petitioner's contentions. The complete transcripts of that hearing, as well as those of petitioner's trial, are before this court, and they supply sufficient data upon which this court may base its decision. A further hearing would serve no purpose since all contentions upon which this court based its decision were previously fully litigated by the parties herein. Such a hearing would constitute a blatant waste of judicial effort. Moreover, there is no major dispute as to the basic facts involved in this case. The events that transpired at petitioner's trial are clear; the only controversy that exists is as to so-called mixed questions of law and fact, and the conclusions of law as to federal questions. While this court gives the state findings of "pure" facts great weight where appropriate, it is not required to adopt them. *Townsend v. Sain*, 372 U.S. 293 (1963). As to most of such facts (that is, as to what actually happened at the trial), this court has accepted the state findings. It has not, and cannot, accept as binding the state court's conclusions as to mixed questions of law and fact and as to the legal consequences of those facts.

II

Respondent is incorrect in his contention that petitioner has failed to exhaust his state court remedies by virtue of the United States Supreme Court's re-

statement of the federal harmless error test three years after the state court's denial of his petition. *Chapman v. California,* 386 U.S. 18 (1967). The cases cited by respondent have no application to this case. *People v. Watson,* 46 Cal. 2d 818 (1956), is cited as indicative of the California harmless error test at the time petitioner's state petition was denied. While it is true that the *Chapman* case was decided subsequent to the state court's decision, and that *Fahy v. Connecticut;* 375 U.S. 85 (1963), the case which *Chapman* clarified, was decided just the day before the state court decision, it is still clear that in late 1963 the California Supreme Court was utilizing what was in essence the *Fahy* test when confronted with federal constitutional error. See, *e.g., People v. Parham,* 60 Cal. 2d 378, 386 (1963):

> "We conclude that since there is no reasonable probability that the admission of the check in evidence affected the result, the judgment must be affirmed."

Further, respondent has expressly rejected, during oral argument, a suggestion that the case be submitted to the California Supreme Court prior to this court's decision on the very basis that is asserted now. He cannot now be heard to claim that such submission is necessary.

Moreover, this is a question of the mere application of a federal standard. It is clear that even an appellate court is able to make an independent determination of the application of the harmless error test, as was done in *Chapman.* It would be a waste of judicial

time, as well as the time of the parties, to require that this case be returned to the state court solely for application of the federal harmless error rule. This is especially true here since (1) the California Supreme Court did not expressly rely upon the harmless error doctrine, and (2) as shown by the *Parham* case, the harmless error rule as then applied by the California court was in substantial compliance with the federal test.

Finally, the cases which respondent has cited in support of his position that petitioner is now required to resubmit his contentions to the state court are not apposite. Those cases involved either new decisions subsequent to the state case which raised a new legal issue, or the assertion of a new factual issue. The *Chapman* case creates no new legal issues; it merely clarifies a standard; and that standard is substantially the one already employed by the California Supreme Court at the time of its decision in petitioner's case.

III

With respect to respondent's contention that there is no evidence that the third fingerprint on the razor case existed at the time of trial, attention is directed to the fact that it was discovered by petitioner's expert to be encircled with blue ink *prior* to the state habeas corpus hearing. It is unlikely that a print belonging to, as respondent now suggests, "some innocuous clerk who placed it there after the trial", would have been so circled, especially since there is no evidence that the razor case was officially re-

examined by anyone from the time of the trial until petitioner's expert saw it. In addition, respondent at oral argument conceded that there was no evidence whatsoever to dispel the inference that the third print was actually on the case at the time it was examined by the state fingerprint expert prior to the time of trial.

IV

The remaining contentions of respondent are without merit.

V

ORDER

It Is Ordered that respondent's petition for a rehearing is denied.

It Is Further Ordered that the clerk this day shall serve copies of this order by United States mail upon the Attorney General of the State of California, the respondent, petitioner and his counsel, the District Attorney of Los Angeles County, the Honorable Joseph A. Wapner, Presiding Judge of the Superior Court of Los Angeles County, and the Honorable William B. Keene, Presiding Judge of the Criminal Courts Department of the Superior Court of Los Angeles County.

May 22, 1969.

Warren J. Ferguson,
United States District Judge.

Filed May 22, 1969,
Clerk, U.S. District Court,
Central District of California.

Appendix C

United States Court Of Appeals
For The Ninth Circuit

No. 24,884

Paul K. Imbler,
Petitioner-Appellee,
v.
State Of California,
Respondent-Appellant.

Appeal from the United States District Court
for the Central District of California

Before: Chambers, Tuttle* and Browning,
Circuit Judges

Per Curiam:

The district court ordered petitioner-appellee's application for habeas corpus granted unless the State instituted proceedings to retry petitioner within sixty days. *Imbler v. Craven*, 298 F.Supp. 795, 812 (C.D. Calif. 1969). Respondent-appellant contends that the district court failed to give the factual findings of the state court (*see In re Imbler*, 60 Cal. 2d 554, 35 Cal. Rptr. 293, 387 P.2d 6 (1963)), the weight to which they were entitled under 28 U.S.C. § 2254(d), as amended November 2, 1966, Pub. L. 89-711, § 2, 80 Stat. 1105.

*Honorable Elbert P. Tuttle, United States Senior Circuit Judge of the Fifth Circuit, sitting by designation.

The identical contention was advanced on petition for rehearing in the district court. It was rejected by the district court with this comment: "[T]here is no major dispute as to the basic facts involved in this case. The events that transpired at petitioner's trial are clear; the only controversy that exists is as to so-called mixed questions of law and fact, and the conclusions of law as to federal questions. While this court gives the state findings of 'pure' facts great weight where appropriate, it is not required to adopt them. *Townsend v. Sain*, 372 U.S. 293 (1963). As to most of such facts (that is, as to what actually happened at the trial), this court has accepted the state findings. It has not, and cannot, accept as binding the state court's conclusions as to mixed questions of law and fact and as to the legal consequences of those facts."

The district court's comment accurately reflects the record; and, so far as it goes, accurately defines the court's obligation under 28 U.S.C. § 2254(d). The district court did not spell out the standard it applied in the few instances in which it departed from the state court's findings of fact; but the district court's opinion clearly implies that the court concluded, in accordance with 28 U.S.C. § 2254(d) (8), that these factual determinations were not fairly supported by the relevant portions of the state court record considered as a whole.

The judgment is affirmed.

Filed, March 11, 1970,
Wm. B. Luck, Clerk.

Appendix D

United States Court Of Appeals
For The Ninth Circuit

No. 24,884

Paul K. Imbler, Petitioner-Appellee,

v.

State Of California, Respondent-Appellant.

ORDER

Before: Chambers, Tuttle* and Browning, Circuit Judges

The concluding paragraph of the opinion filed March 11, 1970, is stricken, and the following is substituted:

> The district court's comment, so far as it went, accurately defined the court's obligation under 28 U.S.C. § 2254(d) to accept as presumptively correct the prior determination by the state court of a "factual issue."
>
> As the Supreme Court said in *Townsend v. Sain*, 372 U.S. 293, 309 n.6 (1963): "By 'issues of fact' we mean to refer to what are termed

*Honorable Elbert P. Tuttle, United States Senior Circuit Judge of the Fifth Circuit, sitting by designation.

basic, primary, or historical facts: facts 'in the sense of a recital of external events and the credibility of their narrators . . . .' Brown v. Allen, 344 U.S. 443, 506 (opinion of Mr. Justice Frankfurter). So-called mixed questions of fact and law, which require the application of a legal standard to the historical-fact determinations, are not facts in this sense." Section 2254(d) was drafted by a committee of the Judicial Conference of the United States composed of judges fully cognizant of this then-recent decision. *See* 1966 U.S. Code Cong. & Ad. News 3663, 3665. There is no reason to suppose that they used the term "factual issue" in the legislation in any different sense.

A close comparison of the opinions of the state court and the federal district court reveals that the court below accepted the "historical-fact determinations" of the state court but reached different conclusions in applying federal constitutional standards to those facts.

The judgment is affirmed.

The petition for rehearing is denied.

Dated: May 5, 1970.

Filed May 5, 1970,
Wm. B. Luck, Clerk.

Appendix E

UNITED STATES CODE

Title 28, Section 2254:

(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record;

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.